

FEDERAL HABEAS CORPUS FOR THE STATE PRISONER — A NEW LOOK

GERALD S. GOLD*

CAROL G. EMERLING**

At the present time, a seemingly appealing avenue in the field of post-conviction remedies for state prisoners is that of habeas corpus in the federal courts. Some United States Supreme Court decisions of the past year hold out glittering prospects to many behind bars who hear about them. How helpful they will prove to be remains to be seen. However, an analysis of these decisions in the light of past habeas corpus reasoning by the federal courts may give both counsel and convict a method of fairly predicting the probability of procedural success on a federal "writ."

HISTORY

Habeas corpus ad subjiciendum or The Great Writ originated in the early fourteenth century as a remedy for the right of due process granted in the Magna Charta. The Great Writ was brought to this country as a firmly entrenched part of the English common law. It remained a remedy in our federal courts for constitutional violations occurring to federal prisoners only, until Congress in 1867 as part of the civil rights bill extended the availability of habeas corpus in the federal courts to include prisoners in state custody.¹

The purpose of the writ is to secure the freedom of those imprisoned under a void judgment. The basic theory is that if a judgment is obtained in violation of due process, then the court never had jurisdiction making a collateral attack a proper remedy. The sentencing court lacks jurisdiction because the conviction of the defendant violated some basic constitutional right to which due process entitled him, or that the law under which he was convicted was unconstitutional.

The writ of habeas corpus has always been available to attack a judgment that was void for want of due process. The main development in the writ over the centuries has come through the

* of the Ohio Bar; Attorney in Charge, Defender's Office, Cleveland Legal Aid Society.

** of the Ohio Bar; Defender's Office, Cleveland Legal Aid Society.

¹ 14 Stat. 385 (1867).

changes in our concept of the meaning of due process. As social development caused the enlargement of the due process rights, so the uses of the writ grew. Although all of these rights were not spelled out in our constitution at the time of its drafting, they were established in our legal system and concept of justice along with our heritage of the English common law. The growth of our own American judicial and legislative system meant that the writ of habeas corpus grew in the uses to which it could be put. The metabolism of this growth was slow but steady until the last ten years, when the pace has become increasingly rapid in the area of the protection of personal liberties.

ISSUES INVOLVED

Curtis R. Reitz, Assistant Professor of Law at the University of Pennsylvania Law School, prepared a study of thirty-five successful federal habeas corpus cases decided between 1950 and 1960.² The most frequently successful claim was based on "right to counsel." This accounted for about one-half of the successful cases. In March of 1963, the United States Supreme Court in *Gideon v. Wainwright*,³ held that indigent defendants were entitled to appointment of counsel in non-capital cases.⁴ This decision has already encouraged many attempts to win habeas corpus in the federal court in states which did not previously recognize the right to counsel in criminal cases.⁵ The United States Supreme Court recently refused to answer whether *Gideon* will act retroactively and merely remanded the matter for state court reconsideration. One can readily see the problems in states now governed by *Gideon*. Fortunately, Ohio has long recognized the right to counsel in all felony cases.⁶

The other cases in Professor Reitz's study show five instances where coerced confessions were at issue and three cases where the prosecution had suppressed evidence favorable to the defendant.

² Reitz, "Federal Habeas Corpus: Post Conviction Remedy for State Prisoners," 108 U. Pa. L. Rev. 461 (1960).

³ 372 U.S. 335 (1963).

⁴ In *Gideon* the petitioner had been sentenced to five years imprisonment. The Court held that a substantial penalty was involved. The question as to whether *Gideon* will apply to misdemeanors is not yet answered. Since felony and misdemeanor qualifications vary greatly from state to state it does not seem likely that the somewhat archaic distinction will govern.

⁵ Recently the Supreme Court remanded several Florida petitioners to the Florida Supreme Court for a determination of the retroactive quality of *Gideon*. Florida may have as many as four thousand "Gideonites." *Pickelsimer v. Wainwright*, 24 U.S. Sup. Ct. Bull. 2 (1963).

⁶ Ohio Const. art. 1, § 10; Ohio Rev. Code §§ 2941.50 and 2941.51.

The remainder were individual situations showing denial of various constitutional rights to defendants.⁷

Even though right to counsel was the winning issue in the preceding study, it would seem clear, that, since the remaining half of the cases were based on diverse issues there is no magic key for success in federal habeas corpus cases. Each case brought stands on its own facts.

Another study, this time on applications for federal habeas corpus, was presented by Mr. Justice Frankfurter in *Brown v. Allen*.⁸ This was a study made of one hundred and twenty-six habeas corpus applications in federal district courts from October, 1950, until May, 1952. The inadequacy of counsel or representation by counsel not of petitioners' choosing was claimed as the principal issue in fourteen cases. In another fourteen, the sentences imposed were attacked as illegal, excessive or discriminatory; in ten cases a charge made that the prosecuting attorney knowingly used perjured testimony or suppressed evidence. In general, errors in the preliminary proceedings were asserted as the main claim in eight cases, errors in the indictment or information in seven, errors affecting the pleas in fourteen, concerning representation by counsel in thirty-one, affecting the trial including inadmissibility of evidence, prejudice and delay in forty-one, and errors surrounding the sentence in seventeen. Miscellaneous claims such as denials of a right to appeal or to a post-trial hearing and defects in extradition proceedings totaled eight.⁹

FEDERAL REQUIREMENTS FOR USE OF HABEAS CORPUS

The availability of the remedy of habeas corpus for state prisoners is governed by a federal statute stating:

State custody; remedies in State Courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.¹⁰

⁷ Perjury by a policeman and failure of a petit juror to disclose that he had been the victim of a similar crime provided two more reasons for the writ. See note 2 *supra*.

⁸ 344 U.S. 443 (1953).

⁹ *Id.* at 498.

¹⁰ 28 U.S.C. § 2254 (1948).

Since the enactment of this statute there have been many federal court decisions interpreting its provisions.

The United States Supreme Court stated its position on several points raised by this statute¹¹ in *Brown v. Allen*.¹² Then last spring it took occasion, in the case of *Fay v. Noia*,¹³ to survey the history of the Great Writ and to present its views on the subject in greater detail.

Before launching into some of the more technical aspects of bringing a habeas corpus action in the federal courts it is to be noted that the precise question to be decided in habeas corpus must have been raised in the state courts.¹⁴ Accordingly, it has been held by the Supreme Court that habeas corpus will not ordinarily be granted in a federal court to a state prisoner on the ground of invalidity of a state law where that issue was not presented to the state court and passed on by it.¹⁵ Similarly failures to present to the state court erroneous insanity instructions¹⁶ and even a claimed deprivation of right to jury trial¹⁷ barred federal habeas corpus eligibility.

*Brown v. Allen*¹⁸ dealt with the exhaustion-of-remedies requirement of the federal statute.¹⁹ The Supreme Court held in that case that available state remedies have been exhausted when an issue has been carried through the state supreme court and certiorari denied by the United States Supreme Court. It is not necessary that a collateral attack, such as state habeas corpus, be made using the same issues in order to pursue the writ in federal court.²⁰ It was further held that federal habeas corpus would be barred as to defendants who failed to perfect their appeals within the time limits prescribed by state law.²¹ In that case the appeals were not perfected until after time for appeal elapsed. The Court held that unless there had been some interference with the defendants' exercise of the right to appeal or some incapacity on their part that prevented them from doing so, their failure to exhaust state remedies which lapsed due to their own delay constituted a bar to bringing federal habeas corpus.

¹¹ *Ibid.*

¹² *Supra* note 8.

¹³ 372 U.S. 391 (1963).

¹⁴ *Gusman v. Manero*, 180 U.S. 81 (1901).

¹⁵ *Ibid.*

¹⁶ *Arsenault v. Gavin*, 248 F.2d 777 (1st Cir. 1957).

¹⁷ *U.S. ex rel. Tillery v. Cavell*, 294 F.2d 12 (3d Cir. 1961).

¹⁸ *Supra* note 8.

¹⁹ *Supra* note 10.

²⁰ *Supra* note 8, at 447.

²¹ *Id.* at 485, 486.

The very recent case of *Fay v. Noia*,²² decided by the Supreme Court in 1963, very definitely re-opens some of the questions thought answered by *Brown*.

As a result of *Noia*, a petitioner need not apply for certiorari to the United States Supreme Court to become eligible for federal habeas corpus.²³ In addition to reversing a pattern adhered to since *Darr v. Burford*,²⁴ the Court limited the state remedies which must be exhausted to those remedies *still open* to the applicant at the time he files his application in federal court.

The extent of this holding is questionable since the Court somewhat carefully excluded obvious purposeful lapses and failures to follow state procedures. The cogent factor in this regard is that the federal court *has authority* to hear the matter when, after an evidentiary hearing, in its discretion it makes the determination that a diligent effort to exhaust state remedies was had. The Court stated:

We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.²⁵

It seems doubtful at this time exactly how much this decision will actually liberalize the rules of eligibility for federal writs. It is quite possible that only the most unusual cases would be helped in any way and the great bulk of cases will remain unaffected by this holding. The Court stated specifically in a note in its opinion in *Noia* that this holding would not affect the *Brown* case in so far as a negligent or deliberate lapsing of time for appeal still bars eligibility for the writ.²⁶ In the light of the recent cases the federal court may make an independent determination as to the negligence or deliberateness of the failure to follow state procedure and is not bound by the state court's factual determination of this question.²⁷

Much of the effect of the *Noia* decision will be determined by the particular federal district or circuit courts. The individual make-up of the judges of these courts may well interpret such a discretionary rule to allow many, few or no plenary hearings to state prisoners.

Three months after *Noia*, an Ohio prisoner who had never

²² *Supra* note 13.

²³ *Id.* at 435, 436.

²⁴ 339 U.S. 200 (1950).

²⁵ *Supra* note 13, at 438.

²⁶ *Id.* at 435.

²⁷ *Id.* at 438, 439.

appealed his conviction or attempted state habeas corpus, relying on *Noia* filed for federal habeas corpus.²⁸ The court of appeals denied the writ stating that the prisoner had not exhausted state remedies *still available* to him in that he did not attempt to file a delayed appeal or a state collateral attack in habeas corpus.

This decision raises many interesting questions, for all Ohio federal courts are under the jurisdiction of this court. A prisoner in Ohio may at any time, if no appeal has been heard, ask an Ohio court of appeals for leave to appeal. The appellate court can in its own discretion grant such permission if "it is in the interests of justice."²⁹ Few leaves to appeal are granted at present by the Ohio courts of appeals except relatively shortly after conviction. Generally, if the county prosecuting attorney is able to show that the delay is due to the would-be appellant's negligence, the leave will not be granted.

Today a very real problem in regard to the question of leave to appeal exists in Ohio. The United States Supreme Court has indicated that an indigent defendant is not only entitled to counsel³⁰ and a transcript of testimony of the trial,³¹ but also to counsel for appeal.³² Although judges of the appellate courts are most certainly aware of the situation and have requested action by the Legislature, none has been forthcoming. A bill for the appointment of counsel for indigent appellants remained in committee in the 1963 Legislature.³³ Prisoners who seem to read the United States Supreme Court advance sheets prior to most lawyers are now requesting the court of appeals to appoint counsel for appeal. The court has no statutory authority to appoint counsel and may sometimes request Legal Aid assistance. However, in Ohio, Legal Aid Societies are not adequately funded or staffed to take on the additional work.

The argument will most certainly be made that the indigent prisoner has been denied due process by the failure of the court to appoint appellate counsel. This points out another advantage of the federal forum for the habeas applicant. The federal court, generally, if requested, and sometimes if not, appoints counsel for indigents seeking habeas relief.

²⁸ *Saulsbury v. Green*, 318 F.2d 320 (6th Cir. 1963).

²⁹ Ohio Rev. Code § 2953.05.

³⁰ *Gideon v. Wainwright*, *supra* note 3.

³¹ *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963).

³² *Douglas v. California*, 372 U.S. 353 (1963).

³³ Bartunek-Miller Bill to amend sections 2941.50 and 2941.51 of the Ohio Revised Code relative to the employment of legal counsel to conduct appeals for indigent defendants in criminal cases. Senate Bill No. 300.

In view of the federal circuit court ruling as to leave to appeal³⁴ it would seem that a rather vain act, that of filing a state motion for leave to appeal, would be a condition precedent to federal intervention in Ohio. Even though the state court will then determine why the time has elapsed, its decision will not bind the federal court factually.

A further part of the above discussed case³⁵ is even more puzzling. The court stated that in addition to leave to appeal a federal habeas applicant must first seek state habeas corpus. It would seem that this holding is out of line with Supreme Court edicts, especially *Brown v. Allen*,³⁶ which specifically stated a state collateral attack was not necessary to satisfy the federal statute.

However, the sixth circuit case may be viewed more as a policy-making decision. If this interpretation is correct the comity between state and federal courts will keep Ohio federal courts out of state cases. In light of some of the comments of a member of the sixth circuit bench,³⁷ this may be quite possible.

HEARING REQUIREMENTS FOR FEDERAL HABEAS CORPUS

Another decision handed down by the Supreme Court on the same day as *Noia* may have an even more profound impact of the area of federal habeas corpus. In *Townsend v. Sain*,³⁸ a five member majority stated that this was the time to set down a standard for the district courts' use in determining when a plenary hearing was required on an application for federal habeas corpus by a state prisoner.

It was held that, generally, when the facts relating to the constitutional deprivations complained of by the writ-seeker are in dispute with the state claims, the federal district court *should* grant a hearing unless the state court trier of fact has, after a full hearing, reliably found the relevant facts.³⁹

The obvious generality of the above test led the court to more definitely particularize instances when an evidentiary hearing *must* be granted:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly

³⁴ See note 28, *supra*.

³⁵ *Ibid.*

³⁶ *Supra* note 8.

³⁷ Address by Clifford O'Sullivan, U.S. Circuit Judge at the Federal Judicial Conference, Sixth Circuit, Dayton, Ohio, *Post Conviction Remedies*, (April 19, 1963).

³⁸ 372 U.S. 293 (1963).

³⁹ *Id.* at 312.

discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.⁴⁰

The majority opinion cautions the district judge that he must ascertain whether the state court judge applied the correct constitutional standards and correct law to the facts presented, and that he "may, and ordinarily should, accent the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicants constitutional claim."⁴¹

In what position is the district court judge now left by this decision? Does he really have any discretionary power left as to whether he should grant a full evidentiary hearing? In analyzing *Townsend v. Sain*,⁴² it would seem that the district court judge has the obligation to make a thorough examination of the record and the surrounding circumstances of the applicant's state trial or hearing. If the examination shows the trial to be questionable, faulty, or defective in any way, then he must order a full hearing to be held in the district court.

In order to make this determination trial transcripts are almost essential. What if they do not exist or were never transcribed? Who must bear the cost of their production? Once a hearing is ordered the applicant has another advantage not found in state court. He can, without cost, subpoena witnesses from all parts of the country subject only to the wise discretion of the court. In state cases the subpoena right is limited by state boundary.

COMITY

The United States Supreme Court has set out with unmistakable clarity the basis on which it required the exhaustion of state remedies to precede an attempt at federal habeas corpus, and the reasoning that enables federal courts to step in and decide issues often contrary to the finding of the state courts. The Court proceeds on the doctrine of comity between the state and federal courts, and explains that the doctrine of *res judicata* is not applicable in this situation.

In *Brown v. Allen*, Mr. Justice Reed said:

In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resorts of another jurisdiction on federal constitutional issues. It is not *res judicata*.⁴²

⁴⁰ *Id.* at 313.

⁴¹ *Id.* at 318.

⁴² *Supra* note 8, at 458.

Mr. Justice Brennan in *Noia* succinctly stated the comity theory:

For the present, however, it suffices to note that rarely if ever has the Court predicated its deference to state procedural rules on a want of *power* to entertain a habeas application where a procedural default was committed by the defendant in the state courts. Typically, the Court, like the District Court in the instant case, has approached the problem as an aspect of the rule requiring exhaustion of state remedies, which is not a rule distributing power as between state and federal courts. (Emphasis by the Court.)⁴³

EFFECTS OF DECISIONS ON DISTRICT COURTS

Although it is too early to tell what the full impact of *Fay v. Noia* and *Townsend v. Sain* will be on the federal district courts, it is possible to foresee a trend toward a heavy increase in habeas corpus filings. The Federal District Court for the Southern District of Ohio, in Columbus, has already had a substantial increase in applications since the March 18, 1963 decision. It is interesting to note that almost an equal increase in the filing of habeas corpus applications has taken place in the state courts. The reason for this is not clear, although experience dictates that whenever a prisoner obtains his release by writ, to his fellows the forum is not especially important, so long as they too put "something" into court. Often the form which the prisoner obtains in prison will determine whether his writ will be filed in common pleas court, the Ohio court of appeals, the Ohio Supreme Court or the federal district court.

What the Supreme Court decisions mean to the federal judiciary was discussed by United States Court of Appeals Judge O'Sullivan:

While this is only a personal guess, I dare to predict that if we add to today's rate of increase the rise that is almost sure to follow the Supreme Court's latest decision, and if we do not improve our own methods of disposing of them, these post-conviction cases may soon be of sufficient volume to exhaust so many of the waking hours of the present manpower of The Federal Judiciary as to seriously impair its ability to handle its total task.

What can be done? Without anyone wishing it to be so, I think that the chief burden of solving this problem falls upon the District Judges. The journey of these cases through our courts usually begins with, and most time ends in the hands of the District Judge. Working together, it should be our aim to limit these matters to one trip over the course.⁴⁴

Thus, it would seem that the sheer force of numbers will present

⁴³ *Supra* note 38, at 425.

⁴⁴ *Supra* note 37, at 3-4.

a large burden to the district judges, especially since *Townsend v. Sain* seems to require a full hearing in so many cases.

Judge O'Sullivan also raised the point of the great power which attaches to the office of the United States district judge. This power has been increased greatly by the Supreme Court decisions discussed above because they give the district court so much power over the state court. He said:

[Y]ou, the District Judges, have now been entrusted with great and awesome power and that the fate of most state prisoners seeking federal relief will be controlled by your discretion seems now to be established.⁴⁵

OUTLOOK FOR THE FEDERAL HABEAS CORPUS APPLICANT

What will all this activity in the area of federal habeas corpus mean to the state convict so often described as languishing in prison?

Unfortunately, the past history of habeas applicants will not afford much encouragement for the present crop of hopefuls.

Earlier in this article mention was made of a study of one hundred and twenty-six applications for federal habeas corpus by both state and federal prisoners.⁴⁶ Of these applications, only one was successful, and that one was originally refused by the district court and granted on appeal. This prisoner's discharge came almost twenty years after his arrest and conviction.

Further, in his concurring opinion in *Brown v. Allen*, Mr. Justice Frankfurter discussing another study stated:

That wholesale opening of State prison doors by federal courts is, however, not at all the real issue before us is best indicated by a survey recently prepared in the Administrative Office of the United States Courts for the Conference of Chief Justices: of all federal question applications for habeas corpus, some not even relating to State convictions, only 67 out of 3,702 applications were granted in the last seven years, and "only a small number" of these 67 applications resulted in release from prison: "a more detailed study over the last four years . . . shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries."⁴⁷

To the dismal prospects for release on federal habeas corpus must be added the warning that upon release the petitioner can be retried, only this time under conditions conforming to due process.

With the recent Supreme Court ruling indicating the possible retroactive nature of *Gideon v. Wainwright* the percentage of suc-

⁴⁵ *Id.* at 14.

⁴⁶ *Brown v. Allen*, *supra*, note 8, at 526.

⁴⁷ *Id.* at 498.

cessful applicants may increase.⁴⁸ This may present a problem for states affected. (Ohio is not.) The length of time required for a federal court to reach and determine a state post-conviction matter generally means that records, evidence, and witnesses are no longer obtainable and so a new trial is most difficult. If *Gideon* is retroactive the fear of an outpouring of prisoners mentioned by Mr. Justice Frankfurter as absurd may become real.

The one success, out of the one hundred twenty-six applicants discussed above, took about twenty years to come about. Out of the thirty-five successful cases in Professor Reitz's study, the longest time span for obtaining relief through federal habeas corpus was twenty-six years; there were thirteen cases where it took ten years or more and, twenty-four cases of five years or more. Many short-termers attempt writs, but their terms expire prior to hearing and the hearings are generally abandoned.⁴⁹

CONCLUSION

Because of desire to avoid incarceration and obtain release as early as possible, prisoners, state or federal, will try every legal means possible. As a result courts may become overburdened, lawyers accused of incompetence, prosecutors overworked and vilified, and the taxpayer burdened. Those who condemn post-conviction remedy are quick to point out the aforementioned factors. The question as to when criminal litigation is final is most often raised. Prosecutors are, and will be, required to resurrect files long thought dead. As was pointed out the prospects for large numbers of prisoners to obtain release because of the new cases is minimal, and those who do obtain release will have already served many years. Why then is this subject so vital as to require the burdens listed by the opposition? The authors do not feel that the sole answer is in Mr. Justice Frankfurter's summation in *Brown v. Allen* when he said, "The meritorious claims are few but our procedures must ensure that those few claims are not stifled by indiscriminating generalities."⁵⁰

Lawyers do not bury their mistakes or the mistakes of law enforcement officials. A file is not dead as long as it represents a human being deprived of liberty. A promise of a forum to correct a wrong of yesterday or twenty years ago insures a better chance at not allowing that same error again.

⁴⁸ *Pickelsimer v. Wainwright*, *supra* note 5. Justice Harlan delivered a rather unusual dissent to a per curiam opinion remanding the case to the Florida Supreme Court for determination in light of *Gideon*. The Justice wanted the High Court to make a definite determination and thereby instruct the state courts as to whether or not *Gideon* will operate retroactively.

⁴⁹ Reitz, *op. cit. supra*, note 2, at 484.

⁵⁰ *Supra* note 8, at 478.